

1  
2  
3  
4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
6

7 LAMARR ROWELL,

8 Plaintiff,

9 vs.

10 GIANNONE et al.,

11 Defendants.  
12

2:07-cv-01169-RCJ-RJJ

**ORDER**

13 This is a prisoner civil rights case on partial remand from the Ninth Circuit. Pending  
14 before the Court is Plaintiff's "Motion to Vacate Order Dismissing Fourth Amendment Claim  
15 Without Prejudice." (ECF No. 154.) For the reasons given herein, the Court denies the motion.

16 **I. FACTS AND PROCEDURAL BACKGROUND**

17 The factual and procedural history of this case have been detailed in the Court's prior  
18 orders. In pertinent part, on July 5, 2007, the LVMPD Defendants arrested Plaintiff for burglary,  
19 possession of a credit card without the owner's consent, and for an ex-felon's failure to change  
20 address. On August 30, 2007, Plaintiff filed this § 1983 action alleging, *inter alia*, violations of  
21 his Fourth Amendment right to be free from unreasonable searches and seizures in relation to the  
22 July 5 arrest. On December 5, 2007, Plaintiff pled guilty to amended charges of burglary and  
23 grand larceny.

24 ///

1 On November 26, 2008, the Court dismissed the Fourth Amendment claim on the basis of  
2 *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*, “when a state prisoner seeks damages in a  
3 § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would  
4 necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be  
5 dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been  
6 invalidated.” *Id.* at 487. Accordingly, the Court held that Plaintiff’s claim of an illegal search and  
7 seizure was barred by *Heck*, stating:

8 Thus, even factually sufficient claims of false arrest, false imprisonment, and  
9 illegal search and seizure by Plaintiff would not be presently cognizable. To  
10 proceed on such claims, Plaintiff must show that any state charges against him  
11 arising from the facts relevant to this case have been dismissed or otherwise  
12 invalidated, or that any conviction on those charges has been invalidated. . . .  
Here, Plaintiff remains in custody for the crimes for which he was arrested on  
July 5, 2007. Because Plaintiff has not demonstrated that the charges against him  
have been dismissed or otherwise invalidated, Plaintiff’s action is premature and  
must be dismissed.

13 (Order 5–6, ECF No. 36.)

14 On March 6, 2012, the Ninth Circuit affirmed the Court’s dismissal of Plaintiff’s Fourth  
15 Amendment claim: “The district court properly dismissed Rowell’s Fourth Amendment search  
16 and seizure claims arising from his arrest because they were *Heck*-barred.” *Rowell v. Ewing*  
17 *Bros. Towing Co.*, 471 F. App’x 597, 599 (9th Cir. 2012). However, the appellate panel  
18 nonetheless found that the Court erred by dismissing these claims with prejudice—because  
19 “claims barred by *Heck* should be dismissed without prejudice”—and remanded with  
20 instructions that the Fourth Amendment claims be dismissed without prejudice. The Court  
21 complied with the Ninth Circuit’s instructions on December 31, 2013. (*See* Order, ECF No. 125.)  
22 In another order, on December 12, 2016, the Court reiterated that Plaintiff’s Fourth Amendment  
23 claims had been dismissed without prejudice and granted Plaintiff leave to amend his Complaint  
24 as to those claims. (*See* Order 4–5, ECF No. 148.)

1 Plaintiff has since filed an amended complaint. (ECF No. 152.) Plaintiff has also filed a  
2 motion to vacate the Court's order of December 31, 2013, in which his Fourth Amendment  
3 claims were dismissed without prejudice pursuant to Ninth Circuit instruction. (Mot. Vacate,  
4 ECF No. 154.)

## 5 II. ANALYSIS

6 There is no basis for granting Plaintiff's motion. He asks the Court to vacate an order  
7 dismissing his Fourth Amendment claims, but those claims were dismissed without prejudice,  
8 and Plaintiff was granted leave to amend his pleading with respect to those claims. Plaintiff has  
9 since amended his pleading, which resulted in the revival of the previously dismissed Fourth  
10 Amendment claims. (See Am. Compl., ECF No. 152.) There is no reason for the Court to vacate  
11 its prior order; the only question is whether the Amended Complaint cures the deficiencies of the  
12 original pleading. Furthermore, the Court entered the order of dismissal under express instruction  
13 to do so from the Ninth Circuit. *Rowell*, 471 F. App'x at 599 ("[W]e vacate the judgment as to  
14 [the Fourth Amendment] claims, and remand with instructions for the district court to dismiss  
15 these claims without prejudice."). Therefore, the Court lacks authority to vacate the order, as this  
16 would directly contravene the Ninth Circuit's mandate. The motion is denied.

17 However, Plaintiff's motion raises arguments relevant to the Amended Complaint, and  
18 the Court will address them here. Citing *Lockett v. Ericson*, 656 F.3d 892 (9th Cir. 2011),  
19 plaintiff argues that the dismissal of his Fourth Amendment claims was improper because his  
20 conviction was the result of a guilty plea. Therefore, because no evidence was presented against  
21 him in any criminal proceeding, Plaintiff asserts that success on his § 1983 claim—i.e., a finding  
22 that the search and seizure related to his arrest on July 5, 2007, were in violation of his Fourth  
23 Amendment rights—could not imply the invalidity of his conviction or sentence. Therefore,  
24

1 Plaintiff argues, the Fourth Amendment claims are not *Heck*-barred. (See Mot. Vacate 2, ECF  
2 No. 154.)

3       However, the Court's dismissal of the Fourth Amendment claims under *Heck* has already  
4 been affirmed by the Ninth Circuit. See *Rowell*, 471 F. App'x at 599 ("The district court properly  
5 dismissed Rowell's Fourth Amendment search and seizure claims arising from his arrest because  
6 they were *Heck*-barred."). "Under the 'law of the case' doctrine, a court is generally precluded  
7 from reconsidering an issue that has already been decided by the same court, or a higher court in  
8 the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (quotation  
9 marks omitted). "When a case has been decided by an appellate court and remanded, the court to  
10 which it is remanded must proceed in accordance with the mandate and such law of the case as  
11 was established by the appellate court." *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1497 (9th  
12 Cir. 1995). Here, it has been explicitly established by a higher court that *Heck* applies to  
13 Plaintiff's specific Fourth Amendment claims, and that the effect of *Heck* in this case is to bar  
14 such claims unless and until Plaintiff "show[s] that any state charges against him arising from the  
15 facts relevant to this case have been dismissed or otherwise invalidated, or that any conviction on  
16 those charges has been invalidated." (Order 5, ECF No. 36.) Therefore, notwithstanding  
17 conflicting Ninth Circuit opinions relevant to the arguments raised by Plaintiff,<sup>1</sup> the Court is  
18 bound by the law of the case established by the appellate panel, and would abuse its discretion in  
19 departing from it.

---

20  
21 <sup>1</sup> Compare *Ove v. Gwinn*, 264 F.3d 817, 823 (9th Cir. 2001) (where § 1983 plaintiffs have pled  
22 guilty or no contest in a criminal case, and then assert Fourth Amendment claims for illegal  
23 search and seizure in relation to the same criminal charges, their civil action is not *Heck*-barred  
24 because "[t]heir convictions derive from their pleas, not from verdicts obtained with supposedly  
illegal evidence"), and *Lockett*, 656 F.3d at 896–97 (same, plea of no contest), with *Whitaker v.*  
*Garcetti*, 486 F.3d 572, 583–585 (9th Cir. 2007) (where § 1983 plaintiffs have pled guilty, their  
Fourth Amendment claims for illegal search and seizure are nonetheless *Heck*-barred), and  
*Szajer v. City of Los Angeles*, 632 F.3d 607, 610–612 (9th Cir. 2011) (same, plea of no contest).

Consequently, the only way Plaintiff can properly plead his Fourth Amendment claim is to include allegations that his “conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” *Heck*, 512 U.S. at 487. No such allegations appear in the Amended Complaint. Therefore, the Court will order Plaintiff to show cause why the Amended Complaint should not be dismissed.

## CONCLUSION

**IT IS HEREBY ORDERED** that the motion (ECF No. 154) is **DENIED**.

**IT IS FURTHER ORDERED that Plaintiff shall file, within thirty days of this order, a memorandum of points and authorities showing cause why the Amended Complaint should not be dismissed.**

IT IS SO ORDERED. *October 19, 2017.*

*R. Jones*

**ROBERT C. JONES**  
United States District Judge